

# **EXHIBIT E**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE:

Case No. 03-10945

FLEMING COMPANIES, INC.,  
et al.,824 Market Street  
Wilmington, DE 19801

Debtor,

August 4, 2003  
11:45 a.m.TRANSCRIPT OF MOTIONS  
BEFORE THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY COURT JUDGE

## APPEARANCES:

For the Debtor:

Pachulski, Stang, Ziehl, Young, Jones  
& Weintraub, P.C.By: LAURA DAVIS JONES, ESQ.  
CHRISTOPHER J. LHULIER, ESQ.  
JAMES I. STANG, ESQ.  
919 North Market Street, 16th Floor  
Wilmington, DE 19899

For Farris, et al.:

Werb & Sullivan  
By: DUANE D. WERB, ESQ.  
Tenth Floor, 300 Delaware Ave.  
Wilmington, DE 19899

For Sunkist:

Whiteman, Bankes & Chebot, LLC  
By: JEFFREY M. CHEBOT, ESQ.  
325 Chestnut Street, Suite 1300  
Philadelphia, PA 19106

For Reliant Energy:

Jackson Walker, LLP  
By: KIRK A. KENNEDY, ESQ.  
1401 McKinney, Suite 1900  
Houston, TX 77010

Audio Operator:

Jennifer M. Patone

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268 Evergreen Avenue  
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E-mail: [jjcourt@optonline.net](mailto:jjcourt@optonline.net)

(609) 586-2311 Fax No. (609) 587-3599

APPEARANCES: (continued)

For the Trustee: U.S. Department of the Trustee  
By: JOSEPH McMAHON

For Hometown Grocery: MICHAEL P. MORTON, P.A.  
1203 North Orange Street  
Wilmington, DE 19801

For XL Specialty Insur.: RICHARD W. RILEY, ESQ.  
1100 North Market Street, Suite 1200  
Wilmington, DE 19801

For Save Mart Supermarkets  
and Cousins Supermarkets: Blank Rome, LLP  
By: MARK J. PACKEL, ESQ.  
1201 Market Street, Suite 800  
Wilmington, DE 19801

For GES, Inc.: Bryan Cave, LLP  
By: MARK S. LICHTENSTEIN, ESQ.  
1290 Avenue of the Americas  
New York, NY 10104

Morris, Nichols, Arsh & Tunnell  
By: GREGORY W. WERKHEISER, ESQ.  
1201 North Market Street, Box 1347  
Wilmington, DE 19899

For McCormick & Co., Inc.  
Mojave Foods Corp.,: Piper Rudnick, LLP  
By: DANIEL J. CARRIGAN, ESQ.  
1775 Wiehle Avenue, Suite 400  
Reston, VA 20190

For Sandelman Landlords  
Cardina Capital Partners: Zuckerman Spaeder, LLP  
By: THOMAS G. MACAULEY, ESQ.  
919 Market Street, Suite 1705  
Wilmington, DE 19899

For Price Choppers: Morris, James, Hitchens & Williams LLP  
By: CARL N. KUNZ, III, ESQ.  
PNC Bank Center, 222 Delaware Avenue  
Wilmington, DE 19899

For Ralphs Grocery Co.: Fulbright & Jaworski, LLP  
By: DAVID A. ROSENZWEIG, ESQ.  
666 Fifth Avenue, 31st Floor  
New York, NY 10103

## APPEARANCES: (continued)

For IBM Credit, LLC: Stevens & Lee  
By: THOMAS G. WHALEN, JR., ESQ.  
BETH STERN FLEMING, ESQ.  
MARNIE E. SIMON, ESQ.  
FRANK C. SABATINO, ESQ.  
300 Delaware Avenue, Suite 800  
Wilmington, DE 19801

For Frio Valley Farms,  
Dave's Market: Campbell & Levine, LLC  
By: AILEEN F. MAGUIRE, ESQ.  
800 N. King Street Suite 200  
Wilmington, DE 19801

For Big 8, Strickland: Campbell & Levine  
By: MARK T. HURFORD, ESQ.  
800 N. King Street, Suite 200  
Wilmington, DE 19801

For Clemens Markets, Inc.,  
Britantine Supermarket,  
Inc. Fox Rothschild, LLP  
By: MICHAEL J. VISCOUNT, JR., ESQ.  
SHELDON K. RENNIE, ESQ.  
1301 Atlantic Avenue, Suite 400  
Atlantic City, NJ 08401

For DDB: Phillips, Goldman & Spence, P.A.  
By: JOHN C. PHILLIPS, JR., ESQ.  
1200 North Broom Street  
Wilmington, DE 19806

For B&R Stores: Ballard, Spahr, Andrews & Ingersoll  
By: WILLIAM M. KELLEHER, ESQ.  
919 North Market Street  
Wilmington, DE 19801

For Renco: Schnader Harrison Segal & Lewis LLP  
By: NICHOLAS J. LePORE, III, ESQ.  
Suite 3600, 1600 Market Street  
Philadelphia, PA 19103

For XL Specialty: Manier & Herod  
By: MICHAEL E. COLLINS, ESQ.  
THOMAS T. PENNINGTON, ESQ.  
One Nashville Place  
Suite 2200, 150 Fourth Avenue North  
Nashville, TN 37219

APPPEARANCES: (continued)

For CHEP, Jubilee:

Reed Smith, LLP  
By: RICHARD A. KEULER, JR., ESQ.  
1201 Market Street, Suite 1500  
Wilmington, DE 19801

Akerman Senterfitt  
By: W. GLENN JENSEN, ESQ.  
255 South Orange Avenue, Citrus Center  
Orlando, FL 32802

For Kraft Foods, NA,  
IGA and IGA USA:

Piper Rudnick, LLP  
By: MARIA ELLENA CHAVEZ-RUARK, ESQ.  
6225 Smith Avenue  
Baltimore, MD 21209

For Ralph's Grocery,  
The Kroger Co.:

Ashby & Geddes  
By: JOSEPH CLEMENT HANDLON, ESQ.  
222 Delaware Avenue, 17th Floor  
Wilmington, DE 19899

For Various Objectants:

Jaspan, Schlesinger, Hoffman, LLP  
By: DMITRY PILIPIS, ESQ.  
1201 N. Orange Street, Suite 1001  
Wilmington, DE 19801

For the Committee:

Pepper Hamilton, LLP  
By: DAVID FOURNIER, ESQ.  
WILLIAM COHEN, ESQ.  
1201 Market Street, Suite 1600  
Wilmington, DE 19899

Milbank, Tweed Hadley & McCloy, LLP  
By: DENNIS F. DUNNE, ESQ.  
LENA MANDEL, ESQ.  
1 Chase Manhattan Plaza  
New York, NY 10005

For Kraft Foods, Int'l,  
Kenosh Associated IGA:

DAVID L. FINGER, ESQ.  
One Commerce Center  
1201 Orange Street, Suite 725  
Wilmington, DE 19801

## APPEARANCES: (continued)

For Village Elm Grove: Cross & Associates, LLC  
By: AMY EVANS, ESQ.  
913 North Market Street, Suite 1001  
Wilmington, DE 19801

For Associated Wholesale  
Grocers: MARGARET M. MANNING, ESQ.  
1300 North Broom Street  
Wilmington, DE 19899

For Associated Wholesale  
Grocers, AWO Acquisitions,  
LLC Del Investments,  
Shield: Husch & Eppenberger, LLC  
By: MARK T. BENEDICT, ESQ.  
1200 Main, Suite 1700  
Kansas City, MI 64105

Blackwell, Sanders, Peper Martin, LLP  
By: JAMES M. ASH, ESQ.  
Two Pershing Square  
2300 Main Street, Suite 1000  
Kansas City, MI 64108

For Dallas County et al: Ferry, Joseph & Pearce, P.A.  
By: THEODORE J. TACCONELLI, ESQ.  
824 Market Street, Suite 904  
Wilmington, DE 19899

For Level Food, Inc.: Ferry, Joseph & Pearce, P.A.  
By: RICK S. MILLER, ESQ.  
824 Market Street, Suite 904  
Wilmington, DE 19899

For Manogistics: Potter, Anderson & Corroon, LLP  
By: LAURIE SELBER SILVERSTEIN, ESQ.  
Hercules Plaza, 1313 N. Market Street  
Wilmington, DE 19899

For Albertson's Inc.: Richards, Layton & Finger, P.A.  
By: KIMBERLY NEWMARCH, ESQ.  
One Rodney Square  
920 N. King Street  
Wilmington, DE 19899

## APPEARANCES: (continued)

For Dell Financial: Seitz, Van Ogtrop & Green, P.A.  
By: KEVIN A. GUERKE, ESQ.  
222 Delaware Avenue, Suite 1500  
Wilmington, DE 19899

For Stevens & Lee  
By: JOSEPH GREY, ESQ.  
300 Delaware Avenue, Suite 800  
Wilmington, DE 19801

For Quine & Associates,  
Inc.: The Bayard Firm  
By: ERIC M. SUTTY, ESQ.  
222 Delaware Avenue, Suite 900  
Wilmington, DE 19899

For MAC Enterprises/ WSP  
Int'l: The Bayard Firm  
By: CHRISTOPHER P. SIMON, ESQ.  
222 Delaware Avenue, Suite 900  
Wilmington, DE 19899

For Hoda, LLC: Ferry, Joseph & Pearce, P.A.  
By: JOHN D. MATTEY, ESQ.  
824 Market Street, Suite 904  
Wilmington, DE 19899

For Picksweet: Elzufon Austin Reardon Tarlov &  
Mondell, P.A.  
By: WILLIAM D. SULLIVAN, ESQ.  
CHARLES J. BROWN, III, ESQ.  
300 Delaware Avenue, Suite 1700  
Wilmington, DE 19899

For Manogistics, Inc.: Arent Fox Kintner Plotkin & Kahn, PLLC  
By: MARY JOANNE DOWD, ESQ.  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036

For Planview: Ashby & Geddes  
By: RICARDO PALACIO, ESQ.  
222 Delaware Avenue, 17th Floor  
Wilmington, DE 19899

For ACE: White and Williams, LLP  
By: MARC STEPHEN CASARINO, ESQ.  
824 North Market Street, Suite 902  
Wilmington, DE 19801

## APPEARANCES: (continued)

For Performance Contracting

GE Capital:

Werb &amp; Sullivan

By: AMY D. BROWN, ESQ.

Tenth Floor, 300 Delaware Avenue

Wilmington, DE 19899

For Bank Bolivar, EFS Nat.

Bank, Provenzano:

Weir &amp; Partners, LLP

By: KENNETH E. AARON, ESQ.

824 Market Street, Suite 1001

Wilmington, DE 19899

For Quillens, VSC, CPW: Tybout, Redfearn &amp; Pell

By: SHERRY RUGGIERO FALLON, ESQ.

Suite 1100, 300 Delaware Avenue

Wilmington, DE 19899

For W C Koch and

Transamerica:

Connolly Bove Lodge &amp; Hutz, LLP

By: MICHELLE McMAHON, ESQ.

1220 Market Street

Wilmington, DE 19899

For Miners, Cousins 3:

Blank Rome, LLP

By: BONNIE GLANTZ FATELL, ESQ.

1201 Market Street, Suite 800

Wilmington, DE 19801

For Skogen &amp; Hergenbath: Foley &amp; Lardner

By: RODERICK B. WILLIAMS, ESQ.

Washington Harbour, Suite 500

3000 K Street N.W.

Washington, D.C. 20007

Smith, Katzenstein &amp; Furlow, LLP

By: KATHLEEN M. MILLER, ESQ.

800 Delaware Avenue

Wilmington, DE 19899

For Sandelman Landlords: Dickstein Shapiro Morin &amp; Oshinsky LLP

By: JEFFREY RHODES, ESQ.

2101 L Street, N.W.

Washington, D.C. 20037

For Borrus &amp; Weatherford: Lyons, Doughty &amp; Veldhuis, P.C.

By: HILLARY VELDHUIS, ESQ.

1288 Route 73, Suite 310

Mount Laurel, NJ 08054

APPEARANCES: (continued)

For New Plan Gibbstown: Ballard Spahr Andrews & Ingersoll, LLP  
By: JEFFREY MEYERS, ESQ.  
1735 Market Street, 51st Floor  
Philadelphia, PA 19103

For Associated Wholesale:

Buchanan, Ingersoll, P.C.  
By: SELINDA A. MELNIK, ESQ.  
Eleven Penn Center, 1835 Market Street  
Philadelphia, PA 19103

For C&S Wholesale Grocers  
and C&S Acquisition:

RICHARD COBB, ESQ.

Simpson Thacher & Bartlett LLP  
By: KENNETH S. ZIMAN, ESQ.  
425 Lexington Avenue  
New York, NY 10017

For Debtors:

Kirkland & Ellis, LLP  
By: RICHARD L. WYNNE, ESQ.  
ANDREW R. RUNNING, ESQ.  
ERIC LIEBELER, ESQ.  
777 South Figueroa Street  
Los Angeles, CA 90017

For Agents:

Greenberg Traurig, LLP  
By: WILLIAM E. CHIPMAN, JR., ESQ.  
The Brandywine Bldg. 1000 West Street  
Wilmington DE 19801

White & Case  
By: ANDREW P. DeNATALE, ESQ.  
DANIEL P. GINSBERG, ESQ.  
1155 Avenue of the Americas  
New York, NY 10036

For Hayes Foodtown,  
Marvin Entities:

Monzack & Monaco, P.A.  
By: RACHEL B. MERSKY, ESQ.  
400 Commerce Center, 12th &Orange Sts.  
Wilmington, DE 19899

APPEARANCES: (continued)

For 28 Retail Merchants: Finkel Goldstein Berzow Rosenbloom & Nash, LLP  
By: NEAL M. ROSENBLOOM, ESQ.  
HARVEY L. GOLDSTEIN, ESQ.  
26 Broadway  
New York, NY 10004

For International  
Brotherhood of Teamsters: Previant, Goldberg, Uelmen, Gratz,  
Miller & Brueggeman, S.C.  
By: FREDERICK PERILLO, ESQ.  
Milwaukee, WI  
  
VIRGINIA E. NEISWENDER, ESQ.  
1900 K. Street, N.W.  
Washington, D.C. 20006

For Sterker Food Corp.,  
Davis Burkett Food,  
German Foods: Morris, James, Hitchens & Williams  
By: STEPHEN M. MILLER, ESQ.  
222 Delaware Avenue, 10th Floor  
Wilmington, DE 19899

1 Counsel's going to come back.

2 MR. PENNINGTON: Okay, fine. That works.

3 THE COURT: All right. Any other objection?

4 MR. HOGAN: Your Honor, this is Timothy Hogan from  
5 Wayne Berry. If I may, Your Honor, I'm not certain if the  
6 Court ever received our objection that was timely filed. It  
7 was 2664?

8 THE COURT: I'm not sure I have, either, so you  
9 better re-articulate it.

10 MR. HOGAN: Wayne Berry was a software developer,  
11 developed software that Fleming has used in the Hawaii  
12 division, at least in Hawaii for sure, since 1999 under a non-  
13 exclusive limited license. I went to trial against Fleming and  
14 got a jury verdict in March, March 6th of this year, Your  
15 Honor, finding Fleming as a wilful infringer for making  
16 derivative copies of the software.

17 Fleming has continued to use Mr. Berry's software.  
18 There's a dispute as to which version is being used, but has  
19 used it and is continuing to use what is claimed to be a new  
20 software package made by the same individual who the jury found  
21 had infringed.

22 My concern is that Mr. Berry is going to have to  
23 pursue the new -- the buyer under a -- the claim of  
24 infringement again. If there's any thought that Mr. Berry's  
25 software is passing in this agreement I'd at least like

1 something in the record, Your Honor, that would at least  
2 indicate they've not chosen to even schedule this software,  
3 they have not chosen to assume it or to assign it, and that  
4 whatever the buyer gets the buyer will get subject to Mr.  
5 Berry's copyright.

6 THE COURT: Well --

7 MR. HOGAN: If any.

8 THE COURT: Let me hear from the debtor and buyer on  
9 that issue.

10 MR. LIEBELER: We're not using the software. I mean  
11 --

12 THE COURT: Who cares if you're using it. Are you  
13 selling it to the buyer?

14 MR. ZIMAN: Your Honor, I do not believe that this  
15 software license is on any list to be assumed and assigned, and  
16 if -- to the extent that we can't assume it and assign it under  
17 365, we won't, and we're certainly not going to infringe.

18 THE COURT: All right. You're satisfied with the  
19 buyer's statement?

20 MR. HOGAN: I'm sorry, Your Honor, I couldn't hear  
21 what the buyer said.

22 THE COURT: Please talk into the mike so he can hear  
23 you.

24 MR. ZIMAN: I'm sorry, Your Honor. I am not aware --

25 MR. HOGAN: Is this Mr. Gross?

1 MR. ZIMAN: I'm sorry, sir, I'm not aware --

2 THE COURT: Raise it so he can actually hear you.

3 MR. ZIMAN: I'm not aware of this license being on  
4 any list to be assumed and assigned as of the initial closing.  
5 I don't have any facts regarding this license, and to the  
6 extent that there's a 365C issue where we can't assume and  
7 assign it, then the Court won't let us, and we're certainly not  
8 going to use it an subject ourselves to infringement liability,  
9 or if we do we are liable.

10 THE COURT: Did you hear that?

11 MR. HOGAN: I did, Your Honor, and I guess what I  
12 conclude from it is -- we believe it is being used, Your Honor,  
13 for the record. It has been used in the case, it has been used  
14 -- and we believe that the software that was created when it's  
15 properly litigated will be shown to be another derivative, the  
16 one that they're going to assume and use.

17 THE COURT: Well, the buyer says they're not buying  
18 it. To the extent they use it you'll have to sue them for  
19 infringement.

20 MR. HOGAN: And that seems to be the way it's left,  
21 Your Honor, as long as it's understood that it's not being  
22 assigned in this sale.

23 THE COURT: I'm not giving any order assuming it,  
24 assigning it by this sale order. To the extent they think they  
25 can assume and assign it later, that issue will be teed up.

1 MR. HOGAN: Yes, Your Honor, and we believe that the  
2 software they're buying is infringed software, so we will  
3 pursue it. Thank you.

4 THE COURT: All right. Anybody?

5 MR. LIEBEKER: Just to make sure and to make it  
6 clear, we contend that we're not using it.

7 THE COURT: I heard you the first time. Any other  
8 objector?

9 MR. RHODES: Good afternoon, Your Honor. Jeff Rhodes  
10 on behalf of the Sandelman landlords, and as a procedural  
11 matter, Your Honor, I have submitted today a motion to be  
12 admitted pro hac vice to this court.

13 THE COURT: All right, that's fine.

14 MR. RHODES: Thank you. I have Mr. McCauley, my local  
15 counsel, with me.

16 Your Honor, on behalf of the Sandelman landlord, who  
17 are landlords that own properties, various properties across  
18 the country to which one or more of the debtor was a party, we  
19 filed an objection basically to cure claim issues.

20 Now, I understand that what the debtors are now  
21 proposing to do is to bifurcate and deal with assumption and  
22 assignment issues later.

23 THE COURT: Yes.

24 MR. RHODES: However, I'm concerned, under the text  
25 of the proposed order that's being circulated that some rights

1 you.

2 MS. JONES: Your Honor, may I ask Your Honor a  
3 mechanical question. With respect to the hearing on Thursday,  
4 would Your Honor like us to submit an agenda?

5 THE COURT: No, that's not necessary.

6 MS. JONES: Thank you.

7 THE COURT: That's fine. I'll just keep what I have  
8 here, but I'd ask parties to send everything to chambers so I'm  
9 sure I get it.

10 MS. JONES: Thank you.

11 THE COURT: All right, we'll stand adjourned then.

12 (Recording ends)

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C E R T I F I C A T I O N

15 I, Betsy Wolfe, certify that the foregoing is a  
16 correct transcript from the electronic sound recording of the  
17 proceedings in the above-entitled matter.

18

Betsy Wolfe

19

Betsy Wolfe

Aug. 11, 2003

Date

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